THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 918/2024

In the matter between:

AGILE CAPITAL HOLDINGS (PTY) LTD **APPELLANT**

and

68 MELVILLE ROAD PROPERTIES (PTY) LTD **RESPONDENT**

Neutral citation: *Agile Capital Holdings (Pty) Ltd v 68 Melville Road Properties (Pty) Ltd* (918/2024) [2026] ZASCA 56 (21 April 2026)

Coram: MAKGOKA, GOOSEN and KEIGHTLEY JJA, CHILI and NUKU AJJA

Heard: 11 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for the handing down of the judgment are deemed to be 21 April 2026 at 11h00.

Summary: Claim for payment of adjusted purchase price of section in sectional title scheme – contract providing for provision of final determination of base development cost to permit adjustment – whether determination requiring submission to expert – nature of dispute raised – whether document evidencing determination admissible in absence of confirmation under oath.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally and Strydom JJ and Ford AJ, sitting as a court of appeal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Goosen JA (Makgoka, Keightley JJA, Chili and Nuku AJJA concurring):

[1] This is an appeal against an order of the full court of the Gauteng Division of the High Court, Johannesburg (the full court), which dismissed an appeal against orders entered by the high court per Adams J (the high court) against the appellant, Agile Capital Holdings (Pty) Ltd (Agile Capital) and nine other entities. This Court granted special leave to appeal. The parties had agreed that the appeal before the full court would be pursued only by Agile Capital, one of the affected entities, since the central issues for determination relate to all the parties. Accordingly, only Agile Capital is before this Court.

[2] 68 Melville Road Properties (Pty) Ltd (Melville Road) is the respondent in the appeal. Its main business is to develop a mixed-use sectional title scheme called Illovo Point, and to sell sections of the scheme to its shareholders to cover the construction costs. It purchased the property from Illovo Point Properties (Pty) Ltd (Illovo Point Properties).

[3] Agile Capital and Illovo Point Properties, along with several other entities, are shareholders of Melville Road. A shareholders' agreement governs, among other things, the extent of shareholders' ownership, based on each shareholder's participation quota in the sectional title scheme. The shareholders of Melville Road were required to fund the property's development through capital advances on loan accounts. Additionally, Melville Road would secure a development bond from a financial institution to cover the development costs. Upon completion of the project, the development bond would be paid off.

The facts

[4] On 3 March 2017, Agile Capital signed a purchase and sale agreement with Melville Road to buy a section within the Illovo Point sectional scheme. The agreement specified that the purchase price could be reduced by the amount of the shareholder's loan account advance and would be subject to final adjustment upon the completion of the project. This adjustment was to be calculated by determining the total base development cost of the scheme's construction and allocating this cost to the shareholder purchasers according to their respective participation percentages. If the actual purchase price paid exceeded the adjusted purchase consideration, the difference would be credited to the purchasers' loan accounts at Melville Road. Conversely, if there was a shortfall, the purchasers would be responsible for the adjustment amount. The latter claim is the focus of the current appeal.

[5] The scheme development was completed on 31 August 2020. The final participation quotas had already been set on 29 August 2018. On 14 September 2020, DHP Quantity Surveyors, then employed by Melville Road, issued a final total base development cost for the project. Based on this, Melville Road sought payment from Agile Capital and nine other purchasers. When the purchasers failed to make the

payments, Melville Road launched ten separate applications in the high court against the shareholder-purchasers, seeking payment of the respective amounts.

In the high court

[6] The ten applications brought by Melville Road involved adjudication of the same issues. The differences related only to the dates of purchase of separate units, the extent of each purchaser's participation quota, and the quantum of the amount claimed. For these reasons, the high court delivered a single judgment dealing with the applications.

[7] Melville Road invoked clause 4 of the purchase and sale agreement, which, in relevant part, provides as follows:

'4.1 It is recorded that the purchase price of the property shall, after registration of the transfer, be adjusted to the amount equal to the final participation quota allocated to the section … multiplied by the Total Base Development Cost after it has been finalized in terms of paragraph 4.3 hereof.

4.2 …

4.3 Once registration of transfer has occurred and once the Total Base Development Costs has been finalized by the Quantity Surveyor … the purchase price shall be adjusted to the amount as finally calculated in accordance with the aforesaid formula and where the purchase price is less than the amount reflected in clause 1.5, the balance shall be refunded through the purchaser's shareholding in the seller entity.

4.4 If there is any dispute as to what the Total Base Development Costs of the property is, the decision of the Quantity Surveyor (acting in his capacity as an expert and not an arbiter) shall be final and binding on the parties.'

[8] Agile Capital opposed the claim for payment of the alleged shortfall due from it. It advanced five grounds of opposition. The first was that the deponent of the founding affidavit lacked authority to institute the proceedings because he had not been authorised by the shareholders themselves. The second was that the total base

development cost was determined by a quantity surveyor who was not the one nominated in the sale agreement.

[9] The remaining grounds of defence were the following. It contended that the determination of the total base development cost, evidenced by a schedule produced by the quantity surveyor, was not confirmed under oath. It therefore constituted hearsay evidence, which was inadmissible. In the absence of proper admission of the evidence, there was no evidence upon which claims against the shareholders could be proved. Regarding the determination of the total base development cost, it was contended that it did not include recoveries arising from the discontinuation of construction and use of certain storage facilities and related insurance. The final defence arose from alleged disputes of fact said to be incapable of resolution on the papers. In this regard, it was alleged that there had been considerable delays with the project; that these were caused by a fellow shareholder, namely Illovo Point Properties (Illovo); and that this had resulted in an accumulation of interest in finance costs in relation to the development bond. It was alleged that this 'rolled up' interest ought to be recovered from Illovo and not from the shareholders as a cost proportionally attributable to the purchasers.

[10] The high court rejected these defences. It reasoned as follows: shareholder consent was not required to institute uncontested debts. There was no dispute that Agile Capital was indebted to Mellville Road. Shareholder consent was therefore not required. In any event, a restrictive interpretation of the requirement for shareholder consent would give rise to unbusinesslike results because it would preclude Mellville Road from recovering debts due by shareholders, as contemplated in the agreements, without the consent of the shareholders concerned.

[11] As far as the identity of the quantity surveyor was concerned, the high court held that the agreement allowed Mellville Road to nominate a quantity surveyor. It considered it doubtful that the parties had applied their minds to whether the contractual clause could be fulfilled only by the initially nominated quantity surveyor. It therefore held, with reference to *Van Diggelen v De Bruin and Another*,[1] that equivalent performance was sufficient.

[12] The high court further held that the determination of the base development cost set out in the schedule was self-explanatory and did not require confirmation under oath. In any event, the high court held that neither a challenge to the veracity of the items or figures included in the calculation nor to the authenticity of the document was raised. The challenge was focused on whether certain items ought to have been included or excluded. This was an aspect governed by the terms of the agreement concluded between the parties and could be determined with reference to it.

[13] The high court found that the term 'total base development cost' referred to the total cost of constructing the development to completion. It included the cost of land acquisition, all construction costs, and finance and general costs. The high court found that the costs associated with the provision of storage and insurance formed part of the contemplated development costs of the property. On the 'rolled up' interest, ie the finance and interest costs incurred because of the delays in the project, the high court found that these were costs incurred in the development and were recoverable as part of the total base development costs. The high court took the view that, to the extent there were disputes regarding liability for incurring such additional

---

[1] *Van Diggelen v De Bruin and Another* 1954 (1) SA 188 (SWA) at 193A-194E.

costs, these were matters regulated by the shareholders' agreement and the mechanisms it provided for inter-shareholder recoveries. The high court therefore found in favour of Mellville Road and entered judgment against each of the ten shareholders for the amounts claimed.

In the full court

[14] On appeal to the full court, Agile Capital confined its appeal to two issues. The first issue concerned the high court's jurisdiction to determine the total base development cost. This was, in effect, a reformulation of the challenge to the inclusion of the 'rolled up' interest and finance costs in determining the schedule. The contention was that the inclusion ought to be the subject of an expert determination by a quantity surveyor as provided by clause 4 of the purchase and sale agreement. The second issue concerned the admissibility of evidence regarding the quantity surveyor's determination of the base development cost.

[15] The full court dismissed the appeal. It held that determination by the quantity surveyor did not involve the expertise of a quantity surveyor. It involved calculating the costs actually incurred. No issue had been referred to the quantity surveyor for determination as an expert. In relation to the admissibility of the schedule, the full court considered that the document fell within the ambit of s 3 of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act). The full court held that it was nevertheless admissible. Because these two issues were pursued before this Court in identical formulation, I shall touch upon the full court's reasoning where necessary in considering the merits of the appeal.

In this Court

[16] The two questions posed before this Court may be framed as follows:

(a) In view of the dispute regarding the determination of the total base development cost, were the parties contractually bound to refer the dispute for expert determination in terms of clause 4.4 of the purchase and sale agreement? (the expert determination issue).

(b) If the answer to question one above is negative, does the schedule (Annexure FA 6 to the particulars of claim) constitute hearsay evidence which ought not to have been admitted in evidence? (the admissibility issue).

The expert determination issue

[17] Agile Capital relied upon clauses 4.3 and 4.4 of the purchase and sale agreement to contend that the determination of the base development cost ought first to be made by the quantity surveyor, as an expert. Upon this contention, the high court lacked jurisdiction to entertain the claims as formulated.

[18] There are several difficulties with the contention as it is now advanced. The most obvious lies in the way Agile Capital presented its defences to the claims. The principal arrow to its bow was that the total base development cost had not been determined by the quantity surveyor appointed in terms of the purchase agreement. There was, thus, no determination warranting an adjustment to the purchase consideration payable by each of the shareholders. Agile Capital's challenge to the content of the determination and the admission of the document in evidence were ancillary to this primary challenge that no contractually stipulated determination had been made.

[19] Agile Capital's answering affidavit clearly stated that the adjustment criteria, specifically the calculation of how much the purchase price should be adjusted, were 'not finalised'. To illustrate the consequences of a decision made by a quantity surveyor other than the nominated one, Agile Capital explained the following in its answering affidavit:

'78. Thus, even if the agreed quantity surveyor makes a determination that the Total Base Development Cost has been finalized, the respondent would have the right to dispute this.

79. If this happens, the matter should then only be referred to the agreed quantity surveyor to make a decision on such dispute, and in so doing, a fair process must be followed where the respondent would at least be allowed to make representations to the agreed quantity surveyor.'

[20] Agile Capital persisted with the challenge to the identity of the quantity surveyor throughout proceedings in the high court. It abandoned this only after the high court ruled against it. Its alternative stance before the high court was that the 'dispute' regarding the determination of the base development cost should be ventilated at trial, ie, based on an alleged dispute of fact. It said the following in its answering affidavit:

'The respondent should therefore be given the opportunity to also ventilate this dispute at trial, specifically in this context, to call for further documents pertaining to the Disputed Determination and to cross-examine the applicant's quantity surveyor on it.

[21] There was therefore never a referral of a dispute regarding the base development cost, which required expert determination in terms of clause 4.4 of the purchase agreement. Accordingly, clause 4.4 can be no bar to the adjudication of the claims advanced by Mellville Road. This aspect of the expert determination issue is therefore without any substance. The only other question is whether it could be said that there was a genuine and material dispute of fact before the high court. To decide

this question, it is necessary to identify the disputes Agile Capital raised. The agreement defines base development costs to mean:

'The total base development cost of the scheme, as determined by the Quantity Surveyor, which shall include the cost headings referred to in Annexure E hereto.'

[22] These costs fall into three categories, namely land acquisition costs, construction costs, and finance and general costs. The purpose of the determination of the base development cost was to permit an adjustment of the purchase price to be undertaken by Mellville Road upon completion of the project. The agreement provided for the adjustment to be undertaken on the basis of a proportional allocation of the total purchase consideration between the shareholders in accordance with their participation quotas. Mellville Road made the adjustment calculation. The payment of the adjusted purchase price is a matter between each shareholder purchaser and Mellville Road. The quantity surveyor, under the unambiguous terms of the purchase agreement, did not allocate cost liabilities among shareholders or determine the adjusted purchase price payable by a shareholder.

[23] Agile Capital, however, argued that the dispute involved the inclusion of what it called 'rolled up' interest in the base development cost. It claimed that the person preparing the schedule should not have allocated such costs to be shared by all shareholders based on their participation quotas when one shareholder was responsible for the additional financing and interest costs incurred during the development.

[24] The quantity surveyor, however, played no role in allocation between shareholders. Their task was to determine the development costs, ie, the total costs payable by Mellville Road to bring the project to completion. Significantly, Agile

Capital did not contend that the total base development costs set out in the schedule did not constitute development costs. There was no challenge to the determination upon that basis. The only challenge, such as it was, concerned the inclusion of additional interest and finance charges that had arisen because of certain delays in the project. At no stage did Agile Capital suggest that Mellville Road was not liable to pay those amounts to the financiers who had financed the project. Nor could such a challenge be raised.

[25] Upon a careful reading of the 'dispute' as it was framed, no material dispute of fact arose. To the contrary, there was no dispute that the base development cost was, in fact, incurred and that it was recoverable by way of an adjustment to the purchase consideration payable by the shareholders. Agile Capital's true complaint was that one of the shareholders, Illovo, had delayed taking the transfer of the units it had purchased, and that this delay caused an increase in costs for which it, rather than all other shareholders, should be held liable.

[26] This dispute does not fall within the ambit of the purchase agreement, but of the shareholders' agreement, which, in clause 12.4 of the shareholders' agreement provides:

'Any shareholder who unnecessarily delays the release of the development bond finance or the on-sale conveyancing process shall bear the full cost of any such delay insofar as it affects all compliant shareholders which cost shall include legal fees, interest costs, penalty fees that may be charged by the financial institution granting the development bond provided the prescribed Breach notice is issued to the non-compliant Shareholder in terms of Clause 23 hereof.'

[27] Clause 23 of the shareholders' agreement makes provision, if a breach is not remedied or is incapable of being remedied, *inter alia*, for the involuntary transfer of the non-compliant shareholder's shares and loan account to other shareholders,

subject to the provisions of clauses 16 and 24 of the Agreement. The shareholders' agreement, therefore, provides for the type of dispute that Agile Capital contends underlies the disputed payment of its adjusted purchase price.

[28] It follows that the so-called expert determination question and the reliance upon an alleged material dispute of fact are without substance. The full court correctly rejected the arguments.

The admissibility issue

[29] Agile Capital argued that the full court was wrong to rely on s 3 of the Hearsay Act[2] to admit annexure FA 6 into evidence, especially when no application was made and no case was established for its exceptional admission. Counsel for Mellville Road asserted that it is not for Agile Capital to complain about the lack of a case being made and that the full court was correct to rely on the Hearsay Act, as it was Agile Capital that introduced the argument involving the Hearsay Act. It is also argued that, in any case, the full court was correct.

---

[2] Section 3(1) provides:
(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
(*a*) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(*b*) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(*c*) the court, having regard to—
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,
is of the opinion that such evidence should be admitted in the interests of justice.
terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (e) of that subsection.

[30] I have grave doubts about the full court's approach to the issue. However, for reasons that follow, there is no need to engage with the full court's understanding of the operation of s 3 of the Hearsay Act. That is so because, for the reasons that follow, the contention that FA 6 constitutes hearsay evidence lacks substance.

[31] It is important to note again that Mellville Road's cause of action was based on the terms of the purchase agreement, which stipulated that, upon completion of the development project, Mellville Road would be entitled to recover from each purchaser the difference between the purchase price already paid and a calculated adjusted purchase price. This adjustment would be based on the calculated base development cost determined by a quantity surveyor and the function of each shareholder's participation quota.

[32] Thus, to sustain its claim, Mellville Road was required to prove that the total base development cost had been determined, what the total was, and what each shareholder's operative participation quota was. From this total amount, the amount already paid by each shareholder would be deducted. The difference was the amount claimed from each shareholder.

[33] Mellville Road alleged that the quantity surveyor had made a determination, and it annexed Annexure FA6 to establish this fact. It is important to emphasise that it did not present FA6 to prove the veracity or accuracy of the document's contents, but as proof that the determination had been made, as a matter of fact, and as required by the purchase agreement. That fact was established by the assertion under oath that the determination document had been received from the quantity surveyor.

[34] To sustain the claim, Mellville Road did not have to prove that the determination was correct or that the calculation presented by the quantity surveyor was correct. It would be required *only if its veracity were disputed*. The calculation was never disputed. Agile Capital did not suggest that the cost headings forming the basis of the calculation of the base development cost were incorrect. Nor did it suggest that the particular items or the values included did not fall within what was contemplated as the base development cost. Had it raised any such challenge, Mellville Road would have been required to adduce evidence to prove the veracity or accuracy of FA6. It could not then have relied upon the mere production of the document. In those circumstances, FA6 would have fallen within the ambit of inadmissible hearsay evidence and would have required proof or, if necessary, admission as an exception provided by the Hearsay Act.

[35] This was, however, not the case. Mellville Road relied on FA6 to establish the fact of a determination made by the quantity surveyor. That fact was challenged solely based on the identity of the quantity surveyor who made the determination. When that proposition was rejected, its challenge to the fact of the determination fell away. Agile Capital's only challenge to the 'content' of FA6 was that the additional 'rolled-up interest' should not have been included as a charge recoverable from all shareholders in proportion to their participation quotas because of the delinquency of a particular shareholder. But this challenge, as demonstrated above, was entirely misplaced. To the extent that Agile Capital has a grievance about its obligation to pay its share of the admitted development costs incurred in developing the property, that is a matter to be pursued among the shareholders of Mellville Road.

[36] It follows that FA6 was not hearsay evidence for the case advanced by Mellville Road. Neither s 34 of the Civil Proceedings Evidence Act 25 of 1965, nor s 3 of the Hearsay Act, finds application in this matter. While the full court was incorrect in applying the latter section to admit the evidence in the interests of justice, its order on the appeal before it was correct.

[37] As a result, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

_____

G GOOSEN

JUDGE OF APPEAL

Appearances:

For the appellant:	W B Pye SC
Instructed by:	Claasen Inc., Gauteng
	Bezuidenhouts Inc., Bloemfontein
For the respondent:	D Mahon SC and E Nhutsve
Instructed by:	Boshoff Inc., Pretoria
	Honey Attorneys, Bloemfontein.